

Comments to the US Commerce Department Internet Policy Task Force: Copyright Policy, Creativity and Innovation in the Digital Economy

Docket No: 130927854-3852-01

Introduction

Similar to the debate taking place at the global stage, for over a decade, copyright discussions in the United States have been focusing on how to align copyright law with the Internet. Based on a model of rights arising from territorial and sovereign restrictions, the current copyright regime is challenged by the global and wide reach of the Internet and its technologies as well as by the arrangements that the international community committed to when addressing Internet governance issues. To this end, the Internet Society appreciates the effort of the Department of Commerce (DoC) Internet Task Force to solicit public responses and encourage multistakeholder input on a ranging of issues relating to copyright.

The central issue is whether copyright rules remain relevant in the age of information and open standards networks. Questions (some of them raised also in this Notice) focus on whether copyright – under its current form – is able to support innovation (as exemplified because of the Internet) or whether it can encourage existing and new forms of creative expression.

To address this basic question, the Internet Society's comments will focus on four general areas – **the need for inclusive copyright discussions; the structure of voluntary initiatives; issues of proportionality; and, the correlation between copyright and innovation (arising from Internet open standards)**. These four broad thematic areas also address the issues raised in this Notice.

1. Copyright discussions should promote and take place in an inclusive structure, which is based on input from a wide range of stakeholders.

We appreciate the Department of Commerce's commitment to frame U.S. copyright discussions in an inclusive structure that allows stakeholders and entities engaged in this process to provide their input and share their experiences. The Task Force is an excellent first step toward this goal.

To achieve meaningful inclusiveness in copyright frameworks, it is crucial to keep revisiting what is meant by 'interested stakeholders'. Clearly, the range of participants will continue to evolve as the Internet evolves. For instance, some years ago, cloud and hosting services had not emerged as actors interested in this process. Now, as users and consumers rely heavily on such services for content storage and sharing, it is crucial that these platforms become part of the policy process.

For this to happen, the United States government needs to understand the roles and responsibilities of each one of the actors. Given the advance of technology and the proliferation of new players, copyright should neither treat nor approach all actors the same way. Providing a clear framework of roles and responsibilities will not only allow the organic evolution of the Internet, it will also ensure that copyright law does not become a cumbersome legal tool and that it is able to strike a balance between the need to protect content creation whilst serving the public interest.

Finally and because of the Internet, the United States governments should welcome discussions on what is meant by 'inclusive structures' in the context of copyright. One of the effects of the global Internet is that the decisions made by one state can have a spillover effect on the network as well as on society at large. In this respect and given the prominent and active role of the United States in addressing the various challenges in copyright law and the way these 'affect' the experience and use of the Internet by users in different parts of the world, it is becoming increasingly important in such processes to engage with actors outside the United States. Because of the Internet, policy making at a national level does not necessarily remain within national borders. Like the comments submitted by the Center of Democracy and Technology, the Internet Society believes that opening participation to interested parties outside the US can significantly address these spillovers and can facilitate a robust copyright regime that aligns with the global Internet.

2. Voluntary, self-regulatory initiatives can be efficient but should not be considered panacea.

The Internet Society has noted the Notice's attention to and support of voluntary initiatives to supplement or complement copyright enforcement. Generally, we are in favor of such initiatives to address various issues, including those related to copyright; however, we are also mindful of the risks associated with this approach.

The United States government has stated that "*to be meaningful, self-regulation must do more than articulate broad policies and guidelines*".¹ The Internet Society agrees with this premise - voluntary initiatives should incorporate clear principles that allow participants and consumers to have a common understanding of the parameters, scope and accountability mechanisms of self-regulation. We believe that the Department of Commerce should continue to encourage such initiatives but should also make sure they are steered towards a direction that serves the public interest. In this regard, we offer the following framework for the Department's consideration of voluntary initiatives.

A. Accountable and Transparent Practices

- *Access*: At the very minimum, users need to be provided with the option of having access to information regarding every voluntary initiative that might affect them and their online experience. In this respect, all actors engaged in

¹ http://www.ntia.doc.gov/legacy/ntiahome/privacy/6_5_98FEDREG.htm (22/01/2014)

such practices should take reasonable steps to ensure that users are kept updated and informed about the process and substance of such self-regulatory mechanisms.

- *Enforcement Policies*: Enforcement policies articulate the steps that will be taken when legal action is detected. On this basis, users should be able to understand the scope of enforcement and the parameters of their activity.
- *Education*: Two things are important in this context: first, education should reflect unbiased opinions and should be conducted by third party trusted sources, including academia. Similarly, education should not be limited only to users but should extend to every single entity or individual who is part of the Internet ecosystem.
- *Data Security*: Given the data collected in such industry-based schemes, private bodies creating, maintaining, using or disseminating records of identifiable personal information must take reasonable measures to assure its reliability and take reasonable precautions to protect it from loss, misuse, alteration or destruction.

B. Characteristics of Effectiveness

- *Due process*: Every voluntary-based initiative should adhere to basic and fundamental principles of justice and fairness, including (but not limited to) the right of a hearing, legal certainty and adherence to the rule of law.
- *Judicial safeguards*: Voluntary initiatives should encompass internal and external checks and balances. One such balance is the right of an appeal. However, this right is not self-sufficient and should be accompanied by a process that is affordable and accessible; it should further incorporate rules that are clear and incentivize its use. Finally, it also requires independence and impartiality of all the participants.
- *Transparency*: Disclosure of information to the public about voluntary schemes is another significant feature of such initiatives. This information should include, but should not be limited to, the system's rationale, end goal, how it affects interested parties, etc.
- *Balanced and proportionate rules*: Voluntary mechanisms should strive towards creating rules that are balanced, reflect the rule of law and are proportionate.
- *Trust*: Trust is becoming increasingly important in the spheres of Internet policy making. Any voluntary-driven initiative should seek to build and create an environment of mutual trust first, amongst the actors setting up the system but also, between the actors to which the system is addressed.
- *Periodic reviews*: All systems, including public ones, should be periodically reviewed and evaluated as to their effectiveness. Such reviews test the efficacy of policy mechanisms and their ability to provide answers to the issues they were originally created to address. In the context of the Copyright Alert System (CAS), for instance, the need for a robust review at this stage is key in identifying potential gaps and omissions, a possible revision of its safeguards, a reframing of its deliverables and the precise role of the various actors.

- *Public Interest:* To the extent that self-regulation aims at setting standards that principally reflect industry needs, there is a potential for the standards to reflect the industry's interests rather than the public interest. It is, therefore, essential that self-regulation is neither collusive nor open-ended; it should not operate outside the wider regulatory framework or act independently. In such instances, the role of the government and public interest groups can aid in a monitoring function and lessen the opportunity for abuse and opportunistic changes to the self-regulatory mechanism.

3. Proportionality is key for ensuring a healthy copyright and Internet environment.

In ensuring a balanced copyright framework, it would be an opportunity for the United States government to ensure that any copyright provisions – including, but not limited to, enforcement– should be proportional. Proportionality is used as a guarantor of fairness and justice, and in this function it provides guidance regarding the necessary levels of balance. This is essential especially in the context of the Internet economy.

Over the recent years, we have witnessed how legislation – internationally (ACTA) and nationally (SOPA/PIPA) – has failed to provide answers to some of the challenges facing the copyright community. In part, the reason such policy attempts fail is on the basis of scope and proportionality. In the context of ensuring a proportional response, Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated in his report to the United Nations General Assembly: *“The Special Rapporteur is deeply concerned by discussions regarding a centralized “on/off” control over Internet traffic. In addition, he is alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights. This also includes legislation based on the concept of “graduated response”, which imposes a series of penalties on copyright infringers that could lead to suspension of Internet service, such as the so-called “three-strikes law” in France and the Digital Economy Act 2010 of the United Kingdom”*.²

Over the years, some evidence has emerged identifying the impact a disproportionate regime, especially in relation to statutory damages, can have on chilling innovation and creativity. In 2012, Professor M. Carrier released a widely quoted study where he came to the conclusion that copyright suffers from an innovation problem. With regards to the way lawsuits are taking advantage of the disproportionate levels between the actual harm and the relief sought, Professor Carrier states: *“Especially, as employed against startups, lawsuits have an absolute chilling effect with their ultimate success [...] completely irrelevant. Litigation is expensive, costing – according to two respondents -- \$150,000 to \$200,000 a month*

² http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf
(22/01/2014)

in legal fees. It is demoralizing to employees, who have little interest in working for a company that gets branded as an infringer or as lawless rebels.”³

In this environment, entrepreneurs and start-ups face a highly complex and disproportionate array of potential liability as a result of the existing statutory damages regime. Up to the point a court enters a final judgment, the current law grants a copyright owner the ability to receive both statutory and actual damages and profits. *“The current version of the statute provides that copyright owners can obtain an award of statutory damages for all infringements [...] with respect to any one work [...] in a sum of not less than \$750 or more than \$30,000. The court may increase the award to \$150,000 when a copyright owner demonstrates willful infringement. It can reduce the award to \$200 when the infringer shows it was not aware and had no reason to believe that its activity constituted infringement. With widespread use and a loose definition of willfulness, statutory damages could quickly reach into the billions of dollars”*.⁴ The effect of this disproportionality has been clearly demonstrated in the context of three following cases: one involving Viacom against YouTube⁵, the other the website mp3.com⁶ and the last one the p2p service Limewire⁷.

All this becomes more significant when bearing in mind that intellectual property is an all-inclusive framework for creators, innovators and entrepreneurs at all levels; it traditionally reflects principles of fair use and fair dealing, associated with the respect for and the protection of human rights and fundamental principles; it, quintessentially, exists to provide incentives and promote progress. To this end, the notion of proportionality should underpin all discussions and policy decisions on copyright. For the Internet Society, creating and enforcing intellectual property laws that are proportional and compatible with the rule of law is key for moving forward and for addressing issues of infringement.

4. Any copyright reform should pay regard to the need for innovation and creativity as supported by the Internet’s open standards.

Innovation should become part of any future copyright deliberations. The United States government has an opportunity to commit towards establishing a more robust innovative culture supported by copyright. Innovation requires a copyright system that helps innovators nurture their ideas, turn them into tangible ones and, ultimately, generate economic value.

The Internet, a loosely organized international collaboration of autonomous,

³ Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 Wisconsin Law Review 891, at p. 41

⁴ *Id.*, at p. 44

⁵ *Viacom International v. YouTube, Inc.* No. 07 Civ. 2103

⁶ *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); *UMG Recordings, Inc. v. MP3.Com, Inc.* No.00 CIV 472 (JSR), 2000 WL 1262568.

⁷ Sarah Jacobsson Purewal, *RIAA Thinks LimeWire Owes \$75 Trillion in Damages*, http://www.techhive.com/article/223431/riaa_thinks_limewire_owes_75_trillion_in_damages.html (22/01/2014)

interconnected networks supports host-to-host communication through voluntary adherence to open protocols and procedures defined by Internet Standards. This is reflected in the 2026 Request for Comments (RFC), which (alongside other RFCs) constitutes the main source for the standards community in describing methods, behaviors, research or innovations related to the operation of the Internet. The importance of standards in the Internet ecosystem is such that there are also many isolated interconnected networks, which are not connected to the global Internet, but use the Internet standards.

In this environment, the Internet Society believes that open standards, innovation and intellectual property can complement each other. We believe that copyright can take advantage of the Internet's openness, the same way users have taken advantage of it to create, remix and generally generate content. At the same time, we believe that sites should not abuse this openness, by employing automated copyright filters and tools that seek to filter and/or block copyrighted content or parts of it, which ultimately might stifle the creativity that is currently exemplified through remixing.

History is replete with examples of how innovation and creativity depend on the exchange and the borrowing of ideas. One of the most noteworthy examples is Henry Ford, who echoed the story of Marconi and the invention of the radio, stating at the time: *"I invented nothing new. I simply assembled the discoveries of other men behind whom were centuries of work. Progress happens when all the factors that make for it are ready and then it is inevitable"*.

On this basis, a strong case can be made that nowadays everything is a remix, especially because of the Internet. Writer, director and editor, Kirby Ferguson, eloquently explained this: *"The Grey Album⁸ is a remix. It is new media created from old media. It was made using these three techniques: copy, transform and combine. It's how you remix. You take existing songs, you chop them up, you transform the pieces, you combine them back together again, and you've got a new song, but that new song is clearly comprised of old songs. [...] But I think these aren't just components of remixing. I think these are the basic elements of all creativity. I think everything is a remix, and I think this is a better way to conceive of creativity. [...] American copyright and patent laws run counter to this notion that we build on the work of others. Instead, these laws and laws around the world use the rather awkward analogy of property. Now, creative works may indeed be kind of like property, but it's property that we're all building on, and creations can only take root and grow once that ground has been prepared"*.⁹

⁸ *"The Grey Album* is a mashup album by Danger Mouse, released in 2004. It uses an a cappella version of rapper Jay-Z's *The Black Album* and couples it with instrumentals created from a multitude of unauthorized samples from The Beatles' LP *The Beatles*, more commonly known as *The White Album*. *The Grey Album* gained notoriety due to the response by EMI in attempting to halt its distribution, despite the fact that Jay-Z, Paul McCartney and Ringo Starr expressed their approval of the project." – Wikipedia, http://en.wikipedia.org/wiki/The_Grey_Album (22/01/2014)

⁹ Kirby Ferguson: *Embracing the remix*, <http://www.youtube.com/watch?v=zd-dqUuvLk4> (22/01/2014)

To this end, it becomes crucial that copyright law makes room for new Internet business models that can encourage and support a space for creativity and can create new or enhance existing partnerships based on multi-participatory models. For this to occur, however, it requires effective use of copyright tools and practices that can help minimize the risks for interested participants and play a major role in enhancing competitiveness of technology-based ideas. It further requires a balanced copyright framework that is able to respect the limitations instructed by the rule of law and operate under substantial due process requirements.

In 2013, the Internet Society reflecting on intellectual property issues came to the following conclusion, pursuant to a broad consultative process: when we talk about a balanced intellectual property framework, we should, additionally, bear in mind a structure that, amongst others, fosters competitive markets and enables new actors to enter. Copyright constitutes essentially a government grant of a costly private monopoly over ideas, this monopoly is not meant to encourage restrictive structures. Standing alone, copyright may be able to exclude others, but it should not be used to forestall the introduction of innovative and creative ideas.¹⁰

The Internet Society appreciates this opportunity to provide our views in response to this Notice. We look forward to provide further input and work with the Department of Commerce in moving the discussions forward.

The Internet Society is a non-profit organisation, founded in 1992 to provide leadership in Internet-related standards, education and policy. It is a principles-based organisation, dedicated to ensuring the open development, evolution and use of the Internet for the benefit of people throughout the world.

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¹⁰ Internet Society Issues Paper on Intellectual Property on the Internet, http://www.internetsociety.org/sites/default/files/Internet%20Society%20Issues%20Paper%20on%20Intellectual%20Property%20on%20the%20Internet%20Final_EN.pdf